80-1806

No. ——

Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1981

DAVID R. HARRIS, Superintendent, Greenhaven Correctional Facility, ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Petitioners,

against

FERNANDO BERMUDEZ, JOSE LAUREANO and JOSE BONILLA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Must a federal court on *habeas* review of a state murder conviction, first determine whether jointly represented defendants had waived their right to contest such joint representation as ineffective before granting petitions for writs of habeas corpus on the ground that said defendants suffered actual prejudice by virtue of the joint representation?

2. Must a federal court, in the interest of comity on *habeas* review, afford the state court the opportunity to hold a fact-finding hearing to determine whether jointly represented criminal defendants had consented to multiple representation where the state trial judge had affirmed that he made such an inquiry, off-the-record and before trial, of both defense counsel and of his clients, who, following their convictions, failed to pursue an available, collateral state procedure which would have determined the extent of such an inquiry?

3. Can a federal *habeas* court completely disregard the sworn allegations of a state trial judge that the latter conducted a pretrial inquiry of the attorney who had been jointly retained by three criminal defendants, and that during said inquiry, which occurred in the presence of the defendants, the defense attorney informed the state court that (a) he had advised his clients of the judge's concern that they consider whether conflicting interests could arise at trial, (b) he further advised his clients that the judge would afford them the opportunity to retain separate counsel or request appointed counsel if they so desired and (c) his clients reaffirmed their desire to him and to the trial judge to proceed with their retained attorney?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, David R. Harris, the Superintendent of Greenhaven Correctional Facility *et ano.*, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 11, 1981.

Opinion Below

The order of the Court of Appeals affirming the judgment of the District Court for the Southern District of New York appears in the Appendix hereto. The opinion of the District Court, not yet reported, also appears in the Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on March 11, 1981. This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Fourteenth Amendment, Section One:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Respondents were indicted by the Grand Jury of Bronx County, New York, in February, 1972, for, *inter alia,* acting in concert to commit intentional murder. Respondents jointly retained an attorney, Stanley Siegel, Esq., and in January, 1974, the case was moved to trial. Prior to jury selection, an untranscribed discussion was had among the trial judge, the defense attorney and the prosecutor.

According to the sworn statements of the prosecutor and the trial judge, which were submitted to the District Court in response to respondents' petitions for federal writs of habeas corpus, the judge asked defense counsel whether he had discerned a potential conflict of interest amongst his clients. Mr. Siegel assured the court that no conflict had arisen, or would likely arise during the trial. The trial judge nevertheless directed defense counsel to advise his clients of the court's concern that a conflict of interest might arise during the trial and ask his clients if they wanted the opportunity to retain separate counsel or request that separate counsel be appointed for them.

In a second affidavit submitted to the District Court, the trial judge asserted that he subsequently took the bench and asked defense counsel, in the presence of respondents,

whether he had complied with the court's directive. After counsel replied that he had advised his clients of the court's concern, all three respondents were separately questioned by the trial judge, and they informed the court of their desire to proceed to trial with joint counsel (A. 10-11, 26-27).*

During the trial, eight witnesses testified for the prosecution and six eyewitnesses described the beating which respondents inflicted upon 16-year-old William Travieso. All three respondents were observed carrying knives, and punching and kicking their victim, whose death was caused by a stab wound to his chest. Respondent Bonilla, the sole witness for the defense, testified that the decedent started the fight and that neither he nor his two cohorts used knives during the melee. Respondents were convicted of intentional murder and criminal possession of a weapon after their jury trial in state court (T. 27-43, 97-102, 143-47, 162-63, 210-11, 232-33, 250-51, 298-304).

The judgments of conviction of respondents Laureano and Bermudez were affirmed without opinion by the Appellate Division of the Supreme Court of the State of New York, First Department, on December 3, 1974. The judgment of respondent Bonilla's conviction was affirmed by that court on February 15, 1977. All three defendants unsuccessfully argued that they were denied the effective assistance of counsel at trial by virtue of their joint repre-

* Numbers prefaced by the letter "A" refer to the Joint Appendix submitted by petitioners to the Second Circuit Court of Appeals; those prefaced "T" refer to the transcript of the state trial conducted in New York State Supreme Court, Bronx County, from January 24 to February 5, 1974.

sentation by the attorney whom they had retained. Leave to appeal the judgments of conviction of Laureano and Bermurdez to the New York Court of Appeals was denied by former Chief Judge Charles Breitel on January 22, 1975, while Bonilla's application for leave to appeal to that Court was denied by Chief Judge Breitel on April 14, 1977.

Respondents thereafter petitioned for writs of habeas corpus in the Federal District Court for the Southern District of New York. In support of their petition, respondents submitted the affidavit of their trial attorney who asserted that, in an untranscribed conference, he requested the trial judge to appoint separate counsel before trial commenced and the judge refused his request. In separate affidavits submitted to the District Court, the trial judge and prosecutor controverted that allegation and provided the account of the inquiry described above.

Notwithstanding the existence of these disputed facts never before presented to the state courts, the District Court disregarded the allegations and ruled that respondents had exhausted state remedies and were actually prejudiced by virtue of the joint representation afforded them. The District Court granted respondents' petitions for writs of habeas corpus without ordering a hearing on the disputed facts. On November 26, 1979, this order was affirmed without opinion by the Court of Appeals for the Second Circuit.

Petitioner sought a petition for a writ of certiorari to review the November 26, 1979 order of the Court of Appeals and, on May 27, 1980, this Court granted certiorari. On that date, this Court vacated the order of the Court of Appeals

for the Second Circuit and remanded the matter to the Court of Appeals to reconsider its decision in light of this Court's opinion in *Cuyler* v. *Sullivan,* 446 U.S. 335 (1980). On March 11, 1981, the Court of Appeals again affirmed the order of the District Court which had granted respondents writs of habeas corpus.

Reasons for Granting the Writ

This Court should grant the instant petition to resolve several important questions which remain unanswered concerning both the scope of federal *habeas* review and the recurring issue of multiple representation of criminal defendants.

In *Cuyler* v. *Sullivan, supra* at 346-47, this Court recognized that the Sixth Amendment imposes no duty upon a state trial judge to conduct an inquiry, *sua sponte,* whenever two or more criminal defendants are represented by one attorney. Notwithstanding that ruling, the Court of Appeals for the Second Circuit has now set aside a state murder conviction even though the trial judge affirmed that he had, *sua sponte,* conducted an inquiry of both counsel and of his clients concerning the potential for conflicts of interest to arise and that all parties had reasserted their desire to proceed to trial without separate counsel. By this holding, the Court of Appeals has created an apparent conflict with its own prior decisions and with the decisions of other circuit courts which recognize that criminal defendants can consent to be jointly represented, thereby waiving their right to argue on appeal that the multiple representation failed to provide them with the effective assistance of

counsel. *See Zuck* v. *State of Alabama,* 588 F.2d 436, 440 (5th Cir. 1979); *United States* v. *Waldman,* 579 F.2d 649, 652 (1st Cir. 1978); *Kaplan* v. *Bombard,* 573 F.2d 708, 714-15 (2d Cir. 1978); *United States* v. *Eaglin,* 571 F.2d 1069, 1086 (9th Cir. 1977); *United States* v. *Lawriw,* 568 F.2d 98 (8th Cir. 1977); *United States* v. *LaRiche,* 549 F.2d 1088 (6th Cir. 1977), *cert. denied,* 430 U.S. 987 (1977).

Petitioners urge this Court to review this case so that this murder conviction, and other state convictions, will not be so readily discarded by the federal courts. Despite the existence of sworn factual allegations made by all parties to the state trial, despite the availability of a collateral state procedure which is traditionally used to ascertain the merits of an ineffectiveness of counsel claim [*See Patterson* v. *Leeke,* 556 F.2d 1168 (4th Cir. 1977); *People* v. *Brown,* 45 N.Y.2d 852 (1978); New York Criminal Procedure Law Section 440.10], the court below rushed to a judgment which completely disregarded the traditional notions of comity existent between the federal and state system. More importantly, the decision of the court below, epitomizing, as it does, an improvident exercise of federal *habeas* jurisdiction, is incompatible with several recent decisions of this Court. *See Sumner* v. *Mata,* —— U.S. ——, 101 S. Ct. 764, 770-72 (1981); *Wainwright* v. *Sykes,* 433 U.S. 72, 89-91 (1977); *Stone* v. *Powell,* 428 U.S. 465 (1976). To be sure, the opinions of both the circuit court and of the district judge are prime examples of the dangers inherent in the exercise of federal *habeas* jurisdiction to decide the legal issues of a case without the benefit of the resolution of key factual issues. *See Townsend* v. *Sain,* 372 U.S. 293, 312-14 (1963).

Moreover, the opinion of the court below clearly shows that that court engaged in a great deal of judicial speculation when it found that, by reason of their joint representation, actual prejudice was caused to these respondents. Instead, the trial record reveals a prosecution of three friends who voluntarily chose not to implicate one another at trial but to present a united front against the prosecution's case. Nowhere in the opinion of the court below is there a citation to a single point in the state trial where the attorney who was jointly retained by respondents *"actively represented conflicting interests."* *Cuyler* v. *Sullivan, supra* at 350. A federal court simply should not cast aside a conviction by engaging in conjecture engendered by hindsight, particularly where, as here, the real people involved in the state trial freely chose to present a joint defense. Where criminal accomplices have voluntarily chosen to "stick together" throughout a state trial, out of loyalty, or for any other motive, they should not be heard to complain in federal court that their own trial strategy violated their constitutional rights.

In sum, this Court can announce to state trial judges that jointly represented criminal defendants who, prior to trial, have reasserted their desire to proceed with one attorney, forever waive their right to argue that the attorney they chose to jointly represent them failed to afford them effective representation because conflicts of interest arose at trial. Petitioners ask this Court to grant the instant petition, to announce such a rule, and to correct a decision of the circuit court which is clearly erroneous.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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ALAN D. MARRUS
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Of Counsel

April 1981

APPENDIX A

Order of the United States Court of Appeals for the Second Circuit

Order of the United States Court of Appeals for the Second Circuit

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of March, one thousand nine hundred and eighty-one.

Present:

Hon. WILLIAM H. MULLIGAN
Hon. THOMAS J. MESKILL
Hon. AMALYA L. KEARSE
Circuit Judges.

79-2121

UNITED STATES OF AMERICA *ex rel.* FERNANDO BERMUDEZ,

Petitioner-Appellee,

against

LEON J. VINCENT, Warden, Greenhaven Correctional Facility, Stormville, New York,

Respondent-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This matter was originally before this court on appeal by the State of New York from an order of the District Court for the Southern District of New York, Lasker, J., granting the appellee's petition for habeas corpus. No. 77 Civ. 2048 (S.D.N.Y. June 27, 1979). We affirmed by summary order. 614 F.2d 1285 (2d Cir. 1979). The Supreme Court, however, subsequently granted certiorari and remanded the case to this court for reconsideration in light of *Cuyler* v. *Sullivan,* 446 U.S. 335 (1980). *Harris* v. *Bermudez,* 446 U.S. 962 (1980). Upon reconsideration, therefore, we now hold that the findings of the district court, as set out in the district court opinion, *supra,* and the report and recommendation of Magistrate Nina Gershon, No. 77 Civ. 2048 (S.D.N.Y. April 13, 1979), which was fully adopted by the district court, comply with the standard as enunciated in *Cuyler* v. *Sullivan, supra.* We therefore affirm the order of the district court granting the petition for habeas corpus.

In *Cuyler, supra,* the Court set out a two prong test for cases in which a petitioner asserts a Sixth Amendment claim of ineffective assistance of counsel based upon a conflict of interest arising from multiple representation. First, the Court held that it was not incumbent upon the trial judge to raise the issue in the first instance. If the defendant did raise the issue but the judge failed to afford the defendant an opportunity to demonstrate a conflict of interest, such a conflict may be presumed. *Cuyler* v. *Sullivan, supra,* 446 U.S. at 348. Second, if the defendant failed to raise an objection at trial, he must subsequently show that

an actual, not possible conflict of interest adversely affected his lawyer's performance. *Id.*

On the facts of the present case, this court need not determine whether or not it was the petitioner who raised the conflict of interest issue at the trial. It is apparent that the trial judge knew of the conflict. In any event, the detailed findings set forth in the magistrate's report and recommendation fully support a finding that there existed an *actual* conflict of interest in the present case. The only available defense to the prosecution where all three defendants were represented by the same lawyer was that perhaps none of the three stabbed the victim, but rather, the assailant was a member of the victim's family. There was no possibility for one defendant to attempt to disassociate himself from the others. Such a defense was no defense at all.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

/s/ William H. Mulligan
William H. Mulligan

/s/ Thomas J. Meskill
Thomas J. Meskill

/s/ Amalya L. Kearse
Amalya L. Kearse
Circuit Judges

APPENDIX B

Opinion of the United States District Court for the Southern District of New York

Opinion of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 2048 (MEL)

UNITED STATES OF AMERICA *ex rel.* FERNANDO BERMUDEZ,
Petitioner,

against

LEON J. VINCENT, Warden, Green Haven Correctional Facility, Stormville, New York,
Respondent.

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78 Civ. 1023 (MEL)

JOSE LAUREANO,
Petitioner,

against

SUPERINTENDENT, Auburn Correctional Facility and DEPARTMENT OF CORRECTIONAL SERVICES,
Respondents.

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79 Civ. 1265 (MEL)

JOSE BONILLA,
Petitioner,

against

DAVID HARRIS, Superintendent, Greenhaven Correctional Facility,
Respondent.

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LASKER, D.J.

On March 12, 1974, Fernando Bermudez, Jose Laureano and Jose Bonilla were convicted in state court of acting in concert to murder William Travieso. No single defendant was charged with having been the actual killer. Their convictions were affirmed without opinion by the Appellate Division, and leave to appeal to the Court of Appeals was denied. All three now petition for writs of habeas corpus on the ground that their joint representation at trial denied them their Sixth Amendment right to effective assistance of counsel.

The petitions of Fernando Bermudez and Jose Laureano were referred for recommendation to Magistrate Gershon. Since the issues raised in Bonilla's petition, filed subsequently, are identical to those raised in the other two, the Magistrate's Report will be deemed to apply to it as well.

In a 35 page opinion, the Magistrate recommends that the writs be granted. Because we adopt her findings and conclusion, we make no attempt to duplicate her exhaustive and well-reasoned analysis but deal here only with the objections to her Report made by the State.

Exhaustion of State Court Remedies

It is not disputed that the same claim raised here was presented to the state courts. However, additional facts have been introduced as part of the habeas proceedings which the State contends materially alter the petitioners' argument and require that the cases be sent back to the state courts to afford those courts a "fair opportunity" to review the case in its allegedly new posture.

In their state court appeals no claim was made—at least by Bermudez or Laureano—that defense counsel had actually raised the issue of conflict of interest with the trial court. Instead, petitioners' claim was based solely on the trial judge's failure to exercise his affirmative obligation to inquire into the possibility of a conflict. However, in connection with the habeas proceedings in this court, petitioners have introduced an affidavit from their trial counsel who states that, in an off-the-record discussion, he advised the trial judge that a conflict of interest existed between his clients and requested that separate counsel be appointed. The affidavit further states that the judge dismissed coun-

sel's request as a "stalling tactic". (Affidavit of Stanley Siegel, April 27, 1977, ¶6) The State also supplemented its papers before this court by an affidavit from the trial judge who denies that the conversation described by defense counsel took place and states that he instructed counsel, in an unrecorded conversation, to ask his clients whether they wished to obtain separate counsel but was advised by counsel that they did not. (Affidavit of the Honorable William Kapelman, May 25, 1977, ¶¶ 4-7) Somewhat surprisingly, following the issuance of the Magistrate's Report, the State filed an additional affidavit in which the trial judge states that his conversation with defense counsel on the question of conflict of interest took place in the presence of petitioners and that, when questioned directly by the judge, all three men agreed that they wished to proceed with joint counsel. (Affidavit of April 23, 1979, ¶ 5)

The Magistrate concluded that the additional information offered in support of the petitioners' position did not "critically affect" the claim presented to the state courts. Moreover, she found that it would be futile to remand the case to the state since the appeal of Jose Bonilla, filed after those of the other two, referred to the conversation attested to by defense counsel, and his conviction was nevertheless affirmed. However, the State relies on *Holloway* v. *Arkansas,* 435 U.S. 475 (1978), to argue that the new facts significantly alter petitioner's position. In *Holloway,* the Supreme Court indicated that the degree of prejudice necessary to be established on appeal would vary depending on whether or not defense counsel had raised the issue of prejudice at trial, and held that, in a situation in which counsel repeatedly moved on the record for appointment of separate counsel, prejudice would be presumed.

Despite the State's contentions, we are not persuaded that there is a significant likelihood that the new evidence in the record would alter the disposition of the matter by the state courts. Defense counsel's representations are considerably undercut by the assertion of the trial judge also presented for the first time here that he himself rather than defense counsel raised the possibility of conflict with petitioners. Moreover, even if taken at full value, it is doubtful whether counsel's brief, off-the-record conversation brings this case within the ambit of *Holloway* in which defendants argued forcefully on at least three occasions that they should be granted separate counsel.[1] The concept of futility must be interpreted to encompass notions of economy and fairness. Thus unless new material creates at least a moderate likelihood of a different result, it is futile to send an action back to the state courts. Here, the likelihood of a different outcome is simply too speculative to justify the duplication of effort and the frustration to the parties which a remand to the state court would entail.

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1. Several other factors cast doubt on the likelihood that the state courts would reverse their position. One factor is the already heavy burden of proof met by the prosecution on appeal. Before the Appellate Division petitioners argued, and the State conceded, that the trial judge had not inquired into the possibility of conflict. This circumstance placed the burden on the prosecution of proving an absence of prejudice from joint representation, *United States* v. *DeBerry*, 487 F.2d 448, 453-54 n. 6 (2d Cir. 1973), a burden which the Appellate Division, which affirmed without opinion, apparently found was easily met. Thus the possibility of a different result is minimized by this prior conclusion that petitioners suffered no prejudice at trial. Finally, it is of some significance that Bonilla did refer in passing in his appellate proceedings to the conversation described by his trial lawyer. Although we agree with the State that the issue was placed before the Appellate Division too casually for us to conclude that that court did in fact rely on the proposition, this factor at least raises a question as to whether the state courts have not already passed on the significance of the new evidence.

Prejudice

The State contends that, far from being prejudiced by joint representation, petitioners were assured "a unified defense and thereby avoided incriminating each other." (Objections to the Magistrate's Report, p. 20) However, as the Magistrate pointed out, on the facts of this case a unified defense was no defense at all. It is undisputed that all three defendants were at the scene of the crime and that the only other people present were relatives of the deceased who had come to his rescue. In the face of this overwhelming evidence that one of the three defendants was responsible for the murder, to argue, as defense counsel did at trial, that all three men were innocent was indeed a hollow defense which inevitably redounded to the disadvantage of at least two, if not all three, defendants. See the Magistrate's Report, p. 23.

However, while the evidence rendered a unified defense extremely implausible, it left open the possibility that one or more of the defendants could successfully dissociate himself from the murder itself. The dead man was stabbed only once. Moreover, the testimony at trial varied as to the involvement of each defendant in the fight and as to which defendant—or defendants—was seen straddling Travieso with a knife. (Tr. 100, 106-07, 115-6, 143, 161) Although the State argues that "possible differing degrees of participation were without legal significance" (Objections, p. 20), this argument ignores the burden on the prosecution of establishing that all three defendants possessed the requisite intent to aid in the commission of a murder and that, by dissociating himself from the killing, or by shifting the blame onto another, a defendant might have convinced the

jury that he lacked such intent. Clearly, such a tactic was impossible so long as all three defendants were represented by the same attorney.[2]

Finally, we agree with the Magistrate's conclusion that the prejudice from joint representation extended to the plea bargaining stage.[3] Although petitioners were offered an "all or nothing" plea package by the prosecution, there is a significant likelihood that here, where the State lacked evidence as to which of the three defendants actually committed the stabbing, an independent lawyer might have worked out a special "deal" for his client in exchange for an agreement to testify. See *Holloway* v. *Arkansas, supra,* 435 U.S. at 490.

The Magistrate's Report is affirmed and incorporated in this decision. The petitions of Fernando Bermudez, Jose Laureano and Jose Bonilla are granted, and their convictions will be set aside unless they are granted a new trial within ninety days.

It is so ordered.

MORRIS E. LASKER

U.S.D.J.

Dated: New York, New York
June 27, 1979

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2. The State also contends that, in light of the new evidence concerning the trial judge's investigation into the possibility of a conflict of interest, the burden is on petitioners to establish actual prejudice rather than on the prosecution, as the Magistrate found, to prove an absence of prejudice. Since we agree with the Magistrate that petitioners have in any event established that prejudice did exist, it is unnecessary to decide this question.

3. This contention is raised only by Fernando Bermudez.